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91-2007

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JIM PARRACK, JR.,

Petitioner,

vs.

TEXAS A&M UNIVERSITY,
DR. MELVIN FRIEDMAN, and
DR. GILBERT ROWE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 15, 1992

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QUESTIONS FOR REVIEW

1. The Eleventh Amendment grant of sovereign immunity does not bar Parrack's claims against Texas A&M University and the individual Defendants for violation of Parrack's constitutional right of due process.

2. Parrack stated a claim against the individual Defendants sufficient to avoid the individual Defendants qualified immunity under the Eleventh Amendment and 42 U.S.C. §1983.

3. Parrack stated a claim against Texas A&M University and the individual Defendants under 29 U.S.C. §794(a) (the Rehabilitation Act of 1973) and Tex. Rev. Civ. Stat. Ann. Art. 5221 (k) §5.01(1).

4. In the alternative, Parrack should be entitled to file an amended complaint stating why his claims are valid.

PARTIES TO THE PROCEEDING

1. Jim Parrack, Jr., Petitioner.

2. Texas A&M University, Dr. Melvin Friedman, Dr. Gilbert Rowe, Respondents.

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TEXAS A&M UNIVERSITY,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW Jim Parrack, Jr. ("Parrack") and submits this Petition for Writ of Certiorari requesting that the Supreme Court grant a writ of certiorari, reverse and remand the case for trial, and reconsider the Fifth Circuit and District Court decisions.

PROCEEDINGS BELOW

The District Court partially granted Respondents' Motion to Dismiss in an unreported decision on March 27, 1992. (See Appendix B). The District Court entered its Final Judgment in an unreported decision on June 7, 1991. (See Appendix C). The Fifth Circuit affirmed the District Court in an unreported per curiam decision rendered February 13, 1992. (See Appendix D). The Fifth Circuit denied the Petition for Rehearing in an unreported decision on March 17, 1992. (See Appendix E).

STATEMENT OF JURISDICTION

Petitioner requests this Court to review the Judgment entered by the Fifth Circuit on June 7, 1992. Petitioner sought a rehearing which was denied on March 17, 1992.

Petitioner seeks review of the denial of his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 as described by this Court in *Hafer v. Melo*, 112 S.Ct. 358 (1991). Petitioner also seeks review of the application of the Eleventh Amendment immunity subject to the exceptions stated in *Ex Parte Young*, 209 U.S. 123 (1908).

Petitioner also seeks review of the denial of his claim based on 29 U.S.C. §794(c) and Tex. Rev. Stat. Ann. Art. 5221(k) §501(d) prohibiting discrimination based on handicaps.

STATEMENT OF THE CASE

From May 1978, through February 1988, Parrack was employed at Texas A&M University. On May 8, 1978, Parrack was appointed to the position of Applied Oceanographer at Texas A&M University. He performed in his

job with acknowledged ability, and received steady and continuous raises based on his performance of his duties. The periodic raises received by Parrack averaged 5-6% per year.

Prior to May of 1987, Parrack began to suffer from a subdural hematoma which progressively worsened until May 15, 1987, when he was involved in an accident, Parrack was unaware of the hematoma until he was examined for physical injuries after the accident.

As a result of the subdural hematoma, and the physical effects of this condition, Parrack began to suffer reduced efficiency in the performance of his work. This physical condition adversely affected the relationship between Parrack and the employees at his office.

On June 2, 1987, after the hematoma was discovered, surgery was performed on Parrack. The hematoma was a disability that made Parrack handicapped by substantially limiting his major life activities. The subdural hematoma caused Parrack to become disoriented, disorganized, dizzy, to have headaches, loss of concentration and memory. The condition affected all areas of his life, including his ability to perform his job, and supervise his subordinates.

After the surgery, he began to improve, and had recovered substantially all of his faculties by February 1988. By February 1988, it was no longer necessary for Defendants to provide any accommodations to Plaintiff, as he had recovered from his disability. Instead of returning him to his duties as promised, Parrack was terminated.

In September of 1987, Dr. Gilbert Rowe was hired as the new department head of the Department of Oceanography, College of Geosciences. At that time Parrack was recuperating from his surgery. Parrack continued to

improve and to assume more and more of his former duties.

When Parrack returned to work, his relationships within the department were still strained from the previous effects of the hematoma. In this environment, Dr. Rowe received a complaint sometime before February 25, 1988, that Parrack had deliberately damaged an employee's car.

Rowe did not inform Parrack of the complaint or of the fact that criminal charges had been filed. Instead he lead Parrack to believe he would be returned to his full job responsibilities and said Parrack would be finally returned to all job responsibilities.

On February 26, 1988, Dr. Rowe requested Parrack to prepare a memorandum for Rowe's signature returning Parrack to all of his duties and responsibilities.

On February 27, 1988, the memorandum was prepared by Parrack and presented to Dr. Rowe for his signature. At that time Dr. Rowe advised Parrack that the memorandum was too long and that it should be shortened.

Parrack prepared a shorter memo for Dr. Rowe's signature returning Parrack to full duty status which was presented to Dr. Rowe on February 29, 1988.

On February 29, 1988, at Dr. Friedman's request, Parrack attended a meeting with Dr. Melvin Friedman, Dr. Rowe, and Mr. Bill Wade, a University Police Detective. At that meeting Parrack was handed a letter which stated that he was being suspended without pay. Mr. Wade then informed Parrack that he was under arrest for criminal mischief. Parrack never saw or received a warrant for his arrest. Parrack was not given an opportunity to respond to the charge.

Parrack was publicly arrested, booked, and finger printed and photographed twice, once at Texas A&M University Police Department, and a second time at the Brazos County Jail. This episode caused Parrack severe shock, humiliation, shame, anguish, and mental depression. Said conduct was designed to intimidate and humiliate Parrack, and was completely unjustified.

Upon being arrested, Parrack was asked for his key to the Oceanography and Meteorology Building and was advised by Dr. Friedman that he would be asked to resign regardless of the outcome of any criminal proceedings regarding the allegations of the commission of any offense.

Parrack was never given an opportunity to present any explanation or defense of the misdemeanor charge brought against him. Defendants prohibited Parrack from returning to his former employment. Parrack was forced to resign his position at Texas A&M.

Parrack seeks recovery from Defendants for denial of his rights to due process under the Fifth and Fourteenth Amendments to the Constitution and pursuant to 42 U.S.C. §1983 and for violations of his rights under State and Federal Statutes prohibiting discrimination based on handicaps.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

Petitioner seeks recovery for a fundamental denial of his rights of due process guaranteed in the Fifth and Fourteenth Amendments to the United States Constitution, and by statutory provision in 42 U.S.C. §1983. Petitioner was denied his liberty interest and his property interest by the Respondents' accusations without having any opportunity provided to hear the charges against him and rebut the charges.

The Fifth Circuit did not even address this Court's decision in *Hafer v. Melo,* 112 S.Ct. 358 (1991) which affirms Petitioner's right to bring his claims against Defendants Friedman and Rowe. Unless this Court grants certiorari, Petitioner will be denied his rights of due process. Further, absent this Court's review, the lower Court decisions which contradict this Court's decisions will be allowed to stand, resulting in great harm to Petitioner. Failure to grant a Writ of Certiorari will allow the Defendants' conduct to be unchallenged even though it violates the fundamental right of due process guaranteed in the Constitution.

RESTATEMENT OF QUESTION ONE PRESENTED FOR REIVEW

THE ELEVENTH AMENDMENT GRANT OF SOVEREIGN IMMUNITY DOES NOT BAR PARRACK'S CLAIMS AGAINST TEXAS A&M UNIVERSITY AND THE INDIVIDUAL DEFENDANTS FOR VIOLATION OF PARRACK'S CONSTITUTIONAL RIGHT OF DUE PROCESS.

Argument and Authorities

The Supreme Court recently addressed the immunity provided by the Eleventh Amendment in *Hafer v. Melo,* 112 S.Ct. 358, 364 (1991). The court held that the Eleventh Amendment does not provide a shield against suits seeking to impose individual and personal liability on state officials who have deprived another of a constitutionally guaranteed right, privilege, or immunity. See also *Molzof v. United States,* 112 S.Ct. 711 (1992) (expanding remedy of damage awards in suits against the government).

The Fifth Circuit determined that Parrack's claim under Federal Rule of Civil Procedure 12(b)(6) is insufficient to review the dismissal of a constitutional claim for lack of subject matter under Rule 12(b)(1). However, Parrack's appeal raises a fundamental claim for violation of his constitutional rights of due process which is properly addressed by the arguments under Rule 12(b)(1) and 12(b)(6). Parrack's claims against Texas A&M University and the individual Defendants for violations of his constitutional rights are not protected by sovereign immunity granted in the Eleventh Amendment.

In the majority opinion of *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 104-105 (1984), the Court noted an exception to Defendants' claim of immunity and stated:

> sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," (*Ex parte Young,* 209 U.S. at 160.) This rationale, of course, created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (opinion of STEVENS, J.). Nonetheless, the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." *Young, supra,* 209 U.S., at 160, 28 S.Ct., at 454. As Justice BRENNAN has observed, "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez v. Ledesma,* 401 U.S. 82, 106, 91 S.Ct. 674, 687, 27 L.Ed.2d 701 (1971) (concurring in part and dissenting in part). Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.

The Eleventh Amendment grant of sovereign immunity does not prohibit a claim against a state institution or individual for a violation of constitutional protection against deprivation of rights under the due process clause of the Fifth and Fourteenth Amendments of the Constitution.

Where governmental employees have a protected right to continued employment or their liberty interest in future employment is affected by the conduct of their governmental employer, the employer should provide the employee procedural due process. *Board of Regents v.*

Roth, 408 U.S. 564, 576, 578, (1972). To be entitled to procedural due process as a matter of constitutional right enforced by the imposition of sanctions upon government employees, the employee must show that he was wrongfully deprived of an interest in "liberty" and "property". *Roth*, 408 U.S. at 572.

LIBERTY INTEREST

If a government employer discharges an individual under circumstances that would do special harm to the individual's reputation and fails to give that individual an opportunity to clear his name, a plaintiff may recover monetary damages under 42 U.S.C. §1983 for the deprivation of his liberty under the Fourteenth Amendment. *Owen v. City of Independence*, 445 U.S. 622, 633 (1988). In *Rosenstein v. City of Dallas, Texas*, 901 F.2d 61 (5th Cir.), *cert. denied*, 111 S.Ct. 153 (1990), a probationary police officer was denied a hearing. The Fifth Circuit held that the city deprived him of a liberty interest where the charges connected with his discharge were defamatory and stigmatizing to the extent that it will do special harm to his reputation and employment opportunities.

The Fifth Circuit held that *Rosenstein* was entitled to recover damages for violation of his interest in "liberty." In *Rosenstein*, as in the case at bar, the employee was not given an opportunity for *any* hearing. Parrack was prevented from offering any explanation or defense to the allegations against him and was not given any opportunity to respond to the charges. He was denied any opportunity to address the allegations of misconduct or face his accusers.

PROPERTY INTEREST

The Supreme Court has held that the existence of a property interest in public employment cognizable under the due process clause of the Fourteenth Amendment depends on whether state law has affirmatively created an expectation that a particular employment relationship will continue unless certain defined events occur. *Bishop v. Wood*, 426 U.S. 341 (1976). Parrack had a property interest in his job which was derived from three sources: federal statute; state statute and state common law. The Rehabilitation Act of 1973 creates a property interest in Parrack's job which requires the minimal constitutional protection of due process afforded by the Fifth and Fourteenth Amendments. Texas has adopted a statute similar to the Rehabilitation Act, at Tex. Rev. Civ. Stat. Ann. art. 5221(k) §5.01 (Vernon 1987). (The Texas Disabilities Act). The Texas statute prohibits the discharge of an employee because of disability.

PROCESS THAT IS DUE

Procedurally, the right to due process requires notice and hearing. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). Parrack is entitled to fundamental rights of due process afforded by the Fifth and Fourteenth Amendment to the Constitution. Where due process is required to protect a property or liberty interest, the minimal requirements of procedural due process in dismissal situations has been held to embrace (1) notice of the charges, (2) a hearing before an impartial decision maker, and (3) an opportunity to present one's own case. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 543 (1985).

RESTATEMENT OF QUESTION TWO PRESENTED FOR REVIEW

PARRACK STATED A CLAIM AGAINST THE INDIVIDUAL DEFENDANTS SUFFICIENT TO AVOID THE INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY UNDER THE ELEVENTH AMENDMENT AND 42 U.S.C. §1983.

Argument and Authorities

The Supreme Court, in a decision handed down November 5, 1991, specifically held that state officials sued in a personal capacity are "persons" within the meaning of 42 U.S.C. §1983, and that the Eleventh Amendment does not provide a shield against suits seeking to impose individual and personal liability on state officials who acting under color of law have deprived another of a constitutionally guaranteed rights, privilege, or immunity. *Hafer v. Melo,* 112 S.Ct. 358, 364 (1991). Furthermore, damage awards against individual defendants in federal courts "are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Hafer v. Melo,* 112 S.Ct. at 364 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 238 (1974). See also *Molzof v. United States,* 112 S.Ct. 711 (1992) (expanding remedy of damage awards in suits against the government).

Congress enacted Section 1983 for the purpose of providing a remedy to persons who have been deprived of their federal rights throughan abuse of state power. *Hafer v. Melo,* 112 S.Ct. at 363. Section 1983 provides that any person acting under color of state statute, ordinance, regulation, custom, or usage, who causes any other person to be deprived of their constitutional rights, privileges, or immunities, shall be liable to that other person. 42 U.S.C. §1983. Thus, Section 1983 liability is predicated on actions made with authority provided

under color of state law. A party who has acted with that authority provided under color of state law. A party who has acted with that authority cannot later reverse his position and use that same authority as a shield against liability. *Hafer v. Melo,* 112 S.Ct. at 363.

A state official is subject to personal liability under Section 1983 for actions made with authority provided under color of state law, regardless of whether the action is necessary to the performance of a governmental function or made within or without the scope of authority. Absolute immunity has been granted only to a very limited class of officials, such as legislators and judges for acting within the scope of authority in the performance of necessary governmental functions. *Hafer v. Melo,* 112 S.Ct. at 363.

Therefore, to establish the personal liability of a party in a Section 1983 action, a person need only show that the party acted under color of state law and caused the deprivation of a constitutional right, privilege, or immunity. *Hafer v. Melo,* 112 S.Ct. at 362.

Appellee's actions in discharging Parrack caused Parrack to suffer injury to his reputation and property without due process, thereby depriving Parrack of his constitutional right to both liberty and property. This action, "under color of law," was taken without providing Parrack his fundamental right of procedural due process afforded by the Fifth Amendment of the Constitution. Parrack has plead: 1) an action under color of law and 2) a deprivation of a constitutional right. Therefore, he has stated all of the necessary elements to maintain his cause of action in a personal capacity suit against the Defendants under 42 U.S.C. §1983.

The Fifth Circuit stated that Parrack's Complaint never sought to implicate the individual Defendants in Parrack's arrest by the University Police, arguing that no connection was alleged between Parrack's arrest and the conduct of the Defendants. However, in Plaintiff's First Amended Complaint at paragraphs 28 through 36, Parrack demonstrates that the individual Defendants arranged the meeting, during the meeting suspended Parrack without pay. At paragraph 34, Parrack alleged that "Upon being arrested, Parrack was asked for his keys . . . and was advised by Dr. Friedman that he would be asked to resign regardless of the outcome of any criminal proceedings regarding the allegations of the commission of any offense."

These allegations, together with the allegations that Parrack was not given an opportunity to provide an explanation or defense to the allegations is sufficiently specific to state a claim for violation of due process rights under the constitution. Parrack received no due process, which includes the right to have a hearing regarding the charges against him.

The Fifth Circuit has also addressed the pleading requirements to assert a claim under §1983 and has determined that the Plaintiff must state specific facts, not merely conclusory allegations. *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) at 1479. Parrack has asserted specific facts stating why the individual Defendants are not entitled to qualified immunity. First, Parrack's claims for violation of constitutional due process and discrimination based on a handicap, state clear violations of known legal rights. (Appendix A p. 2a, 8a-11a).

The factual allegations in Parrack's First Amended Complaint adequately state the factual background to

give the individual Defendants notice of the claims Parrack brings. Parrack has alleged facts and not merely legal conclusions to state a claim under Section 1983.

Parrack alleged that the individual defendants told Parrack that he would be returned to work with his full status restored while simultaneously arranging the arrest and termination of Parrack's employment (Appendix A, p. 8a-10a). This, coupled with Plaintiff's assertion that no opportunity was given to Parrack to address and refute the charges against him. (Appendix A, p. 9a) states a clear and sufficient claim against the individual Defendants. Defendants do not allege that due process was given. Parrack's allegation is that he had no hearing is unrebutted.

Parrack did assert the factual bases to confirm that the Defendants were acting in a deliberate fashion to deprive him of his constitutional rights. Parrack requests this Court to reverse the Fifth Circuit's order rejecting Parrack's claims for denial of due process against the individual defendants. Parrack would show that on paragraphs 27 through 38 of his First Amended Complaint, as well as in paragraph 19 of Parrack's First Amended Complaint, Parrack alleges that the individual defendants did act in a deliberate fashion to deprive Parrack of his constitutional rights. The allegations recite that Defendants engaged in a deliberate course of conduct to schedule the meeting to arrest and suspend Parrack while simultaneously informing Parrack that he would be returned to his full work duties after his rehabilitation had occurred. This contradictory and inconsistent behavior by the individual defendants adequately describes a claim against them in their individual capacities to avoid their qualified immunity.

PLAINTIFF'S CLAIMS UNDER STATE LAW

In *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989), the Fifth Circuit upheld a judgment for intentional infliction of emotional distress in an employment case where the company supervisor planted checks in the employee/plaintiff's purse to make it appear that she was a thief. The court found that such action subjected the plaintiff to a false accusation of theft which satisfied the outrageous conduct necessary to establish intentional infliction of emotional distress. The elements of this claim require that the claimant show that the Defendants acted intentionally or recklessly, that Defendants conduct was extreme and outrageous, that Defendants actions caused the claimant emotional distress and that the distress was severe. *Tideland Auto Club v. Walters*, 699 S.W.2d 939, 944 (Tex. App. – Beaumont 1985, writ ref'd n.r.e.). Since Parrack has stated a claim against Rowe and Friedman, on remand the District Court should consider the pending claims under state law.

RESTATEMENT OF QUESTION THREE PRESENTED FOR REIVEW

PARRACK STATED A CLAIM AGAINST TEXAS A&M UNIVERSITY AND THE INDIVIDUAL DEFENDANTS UNDER 29 U.S.C. §794(a) (THE REHABILITATION ACT OF 1973) AND TEX. REV. CIV. STAT. ANN. ART. 5221(k) §5.01(1).

Argument and Authorities

In Parrack's First Amended Complaint, he stated a claim for wrongful discharge of a handicapped person in violation of 29 U.S.C. §794(a), the Rehabilitation Act of 1973. (See Appendix A) The allegations in Parrack's

claim for discrimination against individuals with handicaps complies with the requirements of Rule 8(a)(2) and contains a short and plain statement of the claim showing that Parrack is entitled to relief. Rule 8(e) requires that each argument shall be simple, concise and direct, and states that technical forms of pleading are not required. Rule 8(f) states that all pleadings shall be construed so as to do substantial justice.

The Fifth Circuit noted that Parrack's Complaint does not assert that he was terminated solely because of his handicap, finding that an allegation that "He was excluded and terminated wrongfully" amounts to no more than a legal conclusion. However, in Parrack's Complaint Parrack alleges at paragraph 58 that "He was discriminated against by Texas A&M University on the basis of the Rehabilitation Act of 1973." This allegation is sufficient to state a claim under the Rehabilitation Act and under Tex. Rev. Civ. Stat. and Art. 5221(k) §5.01(1).

Texas law also prohibits discrimination based on handicaps. The relevant statute states:

> It is an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, disability, religion, sex, national origin, or age. Tex. Rev. Civ. Stat. Ann. art. 5221k §5.01(1).

Texas courts have held that the test for determining if a person is "handicapped" within meaning of §5.07 of the Commission on Human rights act prohibiting employment discrimination on the basis of handicap is whether disability is one which is generally perceived as

severely limiting an individual in performing work-related functions. *Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. 1987).

RESTATEMENT OF QUESTION FOUR PRESENTED FOR REVIEW

IN THE ALTERNATIVE, PARRACK SHOULD BE ENTITLED TO FILE AN AMENDED COMPLAINT STATING WHY HIS CLAIMS ARE VALID.

Argument and Authorities

In the alternative, should this Court determine that Parrack's pleadings aren't explicit regarding the allegation that his termination was caused "solely" as the result of his rehabilitation, and that the allegation that "He was wrongfully terminated in violation of the Rehabilitation Act of 1973" is insufficient, or, that the Court determines that the allegation that Parrack was not given an opportunity to have a hearing on the charges against him is not specific enough to state a claim for violation of due process, Parrack requests that the Court reverse the decision of the District Court and respond with instructions to grant leave for Parrack to file an Amended Complaint to clarify his claims.

Rule 15(a) states that leave to amend shall be freely granted, and this principle has been frequently affirmed by the Courts. *See, e.g., Foman v. Davis*, 371 U.S. 178 (1962). Parrack sought leave to file an Amended Complaint to clarify his claims. Parrack's request to file an amended complaint was not addressed until the district court entered its final judgment. Although the district court did not give this request specific consideration, the law is clear that Parrack should be entitled to file an

amended complaint to state his claim. *Brown v. Texas A&M University*,(804 F.2d 327 (5th Cir. 1986).

CONCLUSION

Parrack has a property right in his employment at TAMU by virtue of federal law, (the Rehabilitation Act of 1973) state law (the Texas Disabilities Act) and state common law. Parrack was publicly arrested and paraded through the halls of his job and university, and was booked twice, once at the University and later at the County Jail. Parrack was not provided any opportunity for notice and a hearing prior to his wrongful suspension and termination, and was not given an opportunity to clear his name. The individual Defendants violated Parrack's constitutional right to due process.

Because the actions of the individual defendants were deliberate and in clear violation of Parrack's rights under the Constitution, federal and state law, the individual defendants are not entitled to assert their qualified immunity under the Eleventh Amendment. Further, on remand the District Court should consider the state claims pending against the individual Defendants.

Since Parrack was a handicapped individual, he is entitled to assert his claim under federal and state law for discrimination against individuals with handicaps. Should the Court determine that Parrack's First Amended Complaint is not sufficiently specific, Parrack requests the opportunity for leave to file an Amended Complaint.

REQUEST FOR RELIEF

WHEREFORE, Parrack requests that this Court reverse the Fifth Circuit and the District Court's decision and remand for trial, and on remand to consider the pending state law claims. Alternatively, Parrack requests that this Court reverse and remand with instructions to grant leave to Parrack to file an amended complaint.

Respectfully submitted,

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June 15, 1992

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was forwarded to counsel listed below by certified mail, return receipt requested, on the 15th day of June, 1992:

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By: _____
For John C. Hampton

APPENDIX A

[Filed Aug. 13, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-90-638
(Jury Trial Requested)

JIM PARRACK, JR.

vs.

TEXAS A&M UNIVERSITY, DR. MELVIN FRIEDMAN, and DR. GILBERT ROWE

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Jim M. Parrack, Jr., Plaintiff, and with leave of Court granted May 11, 1990, files this his First Amended Complaint against Texas A&M University, Dr. Melvin Friedman, and Dr. Gilbert Rowe, seeking recovery of damages because of Defendants' discriminatory and wrongful conduct against Plaintiff, and demanding a trial by jury, urges as follows:

JURISDICTION AND VENUE

1. Jurisdiction is conferred upon this Court by, *inter alia*, 28 U.S.C. §1331 (1982). This action is instituted under Title VII of the Civil Rights Act of 1964, 29 U.S.C. §621 et seq., the Fifth Amendment and Fourteenth Amendment right to due process, 42 U.S.C. §1983, and

for actual damages, punitive damages, reasonable attorney's fees, and costs of suit against Defendants for damages sustained as a result of Defendants' violation of said statutes and laws as hereinafter alleged.

2. This Court has pendent jursidction over the claims based on state law.

3. Venue is proper in the Southern District of Texas pursuant to 28 U.S.C. §1391 (1982), for the reason that all Defendants reside in the Southern District of Texas, and the claim arose in the Southern District of Texas.

THE PARTIES

4. The Plaintiff, Jim M. Parrack, Jr. (hereinafter referred to as "Parrack") is an individual residing in College Station, Brazos County, Texas. Plaintiff's date of birth is June 12, 1931.

5. Texas A&M University is an institution of higher education located in College Station, Texas.

6. Dr. Gilbert Howe is an individual residing in Brazos County, Texas.

7. Dr. Melvin Friedman is an individual residing in Brazos County, Texas.

THE CLAIMS

8. Plaintiff asserts the following claims against Texas A&M University, Dr. Melvin Friedman, and Dr. Gilbert Rowe, both in their individual capacity and as agents of Texas A&M University:

(a) A claim of aga discrimination under 29 U.S.C. §621 *et seq.* (ADEA or the Act);

(b) A constitutional claim for violation of Plaintiff's right to due process under the Fifth and Fourteenth Amendments to the Constitution;

(c) Discrimination against the Plaintiff as an individual with handicaps in violation of §503 of the Rehabilitation Act.

(d) A claim of violation of Plaintiff's civil rights under 42 U.S.C. §1983;

(f) Claims against Dr. Melvin Friedman and Dr. Gilbert Rowe for intentional infliction of emotional distress; and

(g) Claims against Dr. Melvin Friedman and Dr. Gilbert Rowe for tortious interference with Plaintiff's contractual relationship and intentional infliction of emotional distress.

DEFENSES OF IMMUNITY

A. Age Discrimination

9. Plaintiff's claim for age discrimination under 29 U.S.C. §621 *et seq.* is not subject to the Eleventh Amendment grant of immunity. This grant of immunity has been legislatively overruled for violations of the ADEA. 42 U.S.C. §2000D-7(a)2. 42 U.S.C. §2000d-7 provides:

> (a)(2) a state shall not be immune under the 11th Amendment of the Constitution of the United States from Federal Court for violation of §794 of Title 29 . . . .
>
> (b) the provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

B. Violation of Constitutional Right to Due Process

10. The Eleventh Amendment grant of immunity does not prohibit a claim for liability against a state institution for a violation of a constitutional claim for deprivation of rights under the taking and due process clause of the Fifth and Fourteenth Amendments of the Constitution.

11. Defendants' claim of sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character. Thus, an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment.

12. Due process affords both a procedural guarantee against the deprivation of life, liberty and property as well as the substantive aspects of those interests. Procedurally, the right to due process requires notice and hearing.

13. Although the Plaintiff is not a member of a protected class allowing strict scrutiny of an action by a state's agents or a state agency, the Plaintiff is still entitled to fundamental rights of due process afforded by the Fifth Amendment to the Constitution. A public employee whose position is ordinarily terminable at will is not without recourse under §1983 if deprived of a constitutionally protected interest. *Bishop v. Wood,* 426 U.S. 341 (1976).

C. Immunity of Texas A&M University

14. Under the Texas Constitution, Article 7, §11, the Permanent University Fund was created for the maintenance and support of a university of the first class. By §66.03 of the Texas Education Code, the Board of Directors at Texas A&M University shall expend one-third and the Board of Regents of the University of Texas two-thirds of the income from such Fund. By Article 7, §18 of the Texas Constitution, Texas A&M University may issue bonds and notes and pledge its interest in the fund to secure such bonds and notes. The government of Texas A&M University is vested in a Board of Directors, Texas Education Code §85.11, made up of quali-

fied voters who are privately employed citizens from different portions of the State and all expenditures may be made by order of the Board. Texas Education Code §85.22.

The Texas Education Code, §86.02, states:

> Texas A&M University is an institution of higher education located in the city of College Station. It is under the management and control of the board of directors of the Texas A&M University System.

Texas A&M University is a Land Grant University, having received 180,000 acres of land from the United States in July, 1862, and a perpetual fund was created from the sale of such land, "in furtherance of the interests of the University." Texas Education Code, §86.21.

15. Texas A&M University is not a traditionally supported state institution, as it has access to and expends funds other than "public funds in the State treasury." Any monetary award does not have to come from the public funds in the state treasury, as it may come from Texas A&M University's share of the Permanent University Fund, or from the Land Grant Fund, which are not tax funds provided by the taxpayers of the State of Texas. The State of Texas does not exercise any control over these funds, nor can it direct how they are to be spent.

16. Further, Texas A&M University has already waived at least a portion of its sovereign immunity through legislative consent. Tex. Civ. Prac. & Rem. Code §106.002.

17. Specifically, Texas Civil Practice and Remedies Code §104.001(1) states:

State Liability; Persons Covered

> In a cause of action based on conduct described in Section 104.002, the State shall indemnify the following named persons for actual damages, court costs and attorney's fees adjudged against:
>
> (1) an employee, a member of the governing board or any other officer of a State agency, institution or department.

18. Section 104.002(2) of the Texas Civil Practices and Remedies Code states the following:

> (2) the damages arise out of a cause of action for deprivation of a right, privilege or immunity served by the constitution . . . [of the] . . . United States . . .

D. Qualified Immunity

19. The individual Defendants acted with callous indifference, conscious indifference or rockless disregard to the rights of Plaintiff, and the doctrine of due process is intended to secure the individual from the arbitrary exercise of the powers of government. In *Lopez v. Houston Indep. School Dist.*, 817 F.2d 51 (5th Cir. 1987), the 5th Circuit determined that the level of conduct necessary to state a claim for constitutional deprivation under §1983 is callous indifference.

FACTS

20. From May 1978, through February 1988, Parrack was employed at Texas A&M University. On May 8, 1978, Parrack was appointed to the position of Applied Oceanographer at Texas A&M University. He performed in his job with acknowledged ability, and received steady and continuous raises based on his performance of his duties. The periodic raises received by Parrack averaged 5-6% per year.

21. In 1980, Parrack's job title was changed to Oceanographic Operations Manager. By 1988 his position included oversight and management of the entire administrative office of the Department of Oceanography. At the time of his termination his salary was $42,264.00 per annum.

22. Parrack received additional compensation in the form of retirement benefits which were deposited by Texas A&M University, into his retirement account, as well as insurance and other benefits.

23. Prior to May of 1987, Parrack began to suffer from a subdural hematoma which progressively worsened until May 15, 1987 when he was involved in an accident. Parrack was unaware of the hematoma until he was examined for physical injuries after the accident.

24. As a result of the subdural hematoma, and the physical effects of this condition, Parrack began to suffer reduced efficiency in the performance of his work. This physical condition adversely affected the relationship between Parrack and the employees at his office.

25. On June 2, 1987, after the hematoma was discovered, surgery was performed on Parrack. The hematoma was a disability that made Parrack handicapped by substantially limiting his major life activities. The subdural hematoma caused Parrack to become disoriented, disorganized, dizzy, to have headaches, loss of concentration and memory. The condition affected all areas of his life, including his ability to perform his job, and supervise his subordinates. After the surgery, he began to improve, and had recovered substantially all of his faculties by February 1988. By February 1988, it was no longer necessary for Defendants to provide any accomodations to Plaintiff, as he had recovered from this

disability. Instead of returning him to his duties as promised, Parrack was terminated.

26. In September of 1987, Dr. Gilbert Rowe was hired as the new department head of the Department of Oceanography, College of Geosciences. At that time Parrack was recuperating from his surgery. Parrack continued to improve and to assume more and more of his former duties.

27. When Parrack returned to work, the relationships within the department were still strained from the previous effects of the hematoma. In this environment, Dr. Rowe received a complaint sometime before February 25, 1988, that Parrack had deliberately damaged an employee's car.

28. Rowe did not inform Parrack of the complaint or of the fact that criminal charges had been filed. Instead he lead Parrack to believe he would be returned to his full job responsibilities and said Parrack would be finally returned to all job responsibilities.

29. On February 26, 1988, Dr. Rowe requested Parrack to prepare a memorandum for Rowe's signature returning Parrack to all of his duties and responsibilities.

30. On February 27, 1988, the memorandum was prepared by Parrack and presented to Dr. Rowe for his signature. At that time Dr. Rowe advised Parrack that the memorandum was too long and that it should be shortened. During that particular conversation, Dr. Rowe told Parrack that it was his intention to realign the department and that he was going to "get rid" of his staff and faculty members, with the exception of Plaintiff, who were over 55 years of age or who had more than 10 years with the department.

31. Parrack prepared a shorter memo for Dr. Rowe's signature returning Parrack to fully duty status which was presented to Dr. Rowe on February 29, 1988.

32. On February 29, 1988, at Dr. Friedman's request, Parrack attended a meeting with Dr. Melvin Friedman, Dr. Rowe, and Mr. Bill Wade, a University Police Detective. At that meeting Parrack was handed a letter which stated that he was being suspended without pay. Mr. Wade then informed Parrack that he was under arrest for criminal mischief. Parrack never saw or received a warrant for his arrest. Parrack was not given an opportunity to respond to the charge.

33. Parrack was publicly arrested, booked, and fingerprinted and photographed twice, once at Texas A&M University Police Department, and a second time at the Brazos County Jail. This episode caused Parrack severe shock, humiliation, shame, anguish, and mental depression. Said conduct was designed to intimate and humiliate Parrack, and was completely unjustified.

34. Upon being arrested, Parrack was asked for his key to the Oceanography and Meteorology Building and was advised by Dr. Friedman that he would be asked to resign regardless of the outcome of any criminal proceedings regarding the allegations of the commission of any offense.

35. Parrack was never given an opportunity to present any explanation or defense of the misdemeanor charges brought against him. Defendants prohibited Parrack from returning to his former employment. Parrack was forced to resign his position at Texas A&M.

36. The charge of criminal mischief was subsequently dismissed against Parrack for insufficient evidence and his record was expunged. Nevertheless, Parrack was pre-

vented from offering any explanation or defense to the allegations against him and was forced to resign from his position as Oceanographic Operations Manager.

37. As a direct and proximate cause of Defendant's conduct, Parrack suffered severe mental anguish, which triggered corresponding physical and physiological injuries. These injuries have resulted in serious disabilities to Plaintiff which make him unable to perform his work, cause nightmares, trigger flashbacks and create other physical and mental anguish.

38. At the time of this incident, Parrack was 56 years old. He reasonably anticipated continuing to work for Texas A&M University, receiving salary, retirement benefits, and normal raises until he reached the mandatory retirement age of 70.

FIRST CAUSE OF ACTION

Age Discrimination

39. Paragraphs 1 through 38 are incorporated herein for all purposes.

40. Plaintiff would show that he had been discriminated against in connection with his employment on the basis of his age in violation of Title VII, 29 U.S.C. §621 et seq. Further, Defendants have failed to follow the University's own administrative procedures in connection with this matter, and such conduct constitutes an illegal practice.

41. In this regard, Plaintiff would show that he timely filed charges alleging age discrimination with the EEOC. The discrimination alleged above was included in the EEOC charge. Plaintiff received a right-to-sue letter from the EEOC, and this amended Title VII claim in its complaint relates back to the statutorily allotted time in

which a complaint must be filed. Therefore, Plaintiff has exhausted his administrative remedies and generally satisfied the timeliness requirements of Title VII.

42. As a result of the above activity by Defendants in violation of the Title VII, 29 U.S.C. §621 et seq, Plaintiff will suffer damages as set forth below, and reasonable attorney's fees and court costs incurred in connection with the prosecution of this matter.

43. Plaintiff requests liquidated damages under the Act based on the willful and intentional violations of the Act by Defendants. Plaintiff requests damages in an amount equal to Plaintiffs lost earnings, past and future.

SECOND CAUSE OF ACTION

Violations of Constitutional Rights

44. Paragraphs 1 through 38 are incorporated herein for all purposes.

45. By virtue of the above discriminatory conduct of Defendants as described above, Plaintiff has been denied his Fifth and Fourteenth Amendment right to due process and equal protection in violation of the Fifth and Fourteenth Amendments. Plaintiff was completely denied any opportunity to address the allegations of misconduct or face his accusers. In this regard, Plaintiff has been denied a significant property interest as an employee. Defendants have acted with callous indifference to Parrack's rights and have failed to follow the University's own administrative procedures.

46. As a result of the discriminatory activity by Defendants, Plaintiff will suffer monetary damages, mental anguish and reasonable attorney's fees and court costs incurred in connection with the prosecution of this matter. Plaintiff requests damages as set forth in Paragraphs 59-64 below.

THIRD CAUSE OF ACTION

Violations of Civil Rights

47. Paragraphs 1 through 38 are incorporated herein for all purposes.

48. By virtue of the above discriminatory conduct of Defendants as described above, Plaintiff has been denied his Fifth and Fourteenth Amendment right to due process and equal protection in violation of 42 U.S.C. §1983. Plaintiff was completely denied any opportunity to address the allegations of misconduct or face his accusers. In this regard, Plaintiff has been denied a significant property interest as an employee. Defendants have acted with callous indifference to Parrack's rights and have failed to follow the University's own administrative procedures.

49. As a result of the discriminatory activity by Defendants, Plaintiff will suffer monetary damages, mental anguish and reasonable attorney's fees and court costs incurred in connection with the prosecution of this matter. Plaintiff requests damages as set forth in Paragraphs 59-64 below.

FOURTH CAUSE OF ACTION

Qualified Individual Immunity

50. Paragraphs 1 through 38 are incorporated herein for all purposes.

51. Plaintiff's claims against Friedman and Rowe are predicated on the fact that said employees of A&M engaged in conduct that violated clearly established statutory and constitutional right, that reasonable people would know. First they suspended Plaintiff from work without pay, then, simultaneously they refused to allow

Plaintiff the fundamental opportunity guaranteed by the Fifth and Fourteenth Amendments to hear and respond to the charges brought against him. Subsequently, they forced his resignation by giving the choice between termination or grossly reduced salary at a ridiculously over qualified job.

52. As a result of the discriminatory activity by Defendants, Plaintiff will suffer monetary damages, mental anguish and reasonable attorney's fees and court costs incurred in connection with the prosecution of this matter. Plaintiff requests damages as set forth in Paragraphs 59-44 below.

FIFTH CAUSE OF ACTION

Intentional Infliction of Emotional Distress

53. Paragraphs 1 through 38 are incorporated herein for all purposes.

54. Plaintiff avers that the actions of the Defendants in suspending the Plaintiff, in allowing him to be publicly arrested and paraded through the streets while under arrest, in failing to give the Plaintiff an opportunity to defend himself, and coercing the Plaintiff to resign, are actions conducted intentionally or recklessly by Defendants and agents of Defendants. Further, Plaintiff avers that the conduct was extreme and outrageous. Plaintiff will show that the actions of the Defendants caused the Plaintiff emotional distress. Plaintiff will show that such emotional distress was so severe as to result in additional damages described below in Paragraphs 59-44.

SIXTH CAUSE OF ACTION

Tortious Interference

55. Paragraphs 1 through 38 are incorporated herein for all purposes.

56. The actions of the Defendants constitute a deliberate and intentional tortious interference with the Plaintiff's contractual right to enjoy the benefits of his employment agreement with Texas A&M University. The individual Defendants acted with callous and conscious disregard of Plaintiff's rights. Accordingly, the Defendants have engaged in a course of conduct which tortiously interfered with Plaintiff's rights to enjoy his employment status with Texas A&M University. Plaintiff will show that such conduct resulted in damages described in Paragraphs 59-64 below.

SEVENTH CAUSE OF ACTION

Discrimination Against Individuals With Handicaps

57. Paragraphs 1 through 38 are incorporated by reference herein for all purposes.

58. Texas A&M University is an institution that receives federal aid as defined in §503 of the Rehabilitation Act of 1973. Parrack was a qualified individual to perform his duties of employment, and was wrongfully excluded and terminated from his employment by the Defendants herein. Parrack had physical or mental impairments which substantially limited his major life activities, he had a record of such impairment or was regarded as having such impairment, and was discriminated against by Texas A&M University on the basis of his handicap and wrongfully terminated in violation of the Rehabilitation Act of 1973. This termination resulted in the damages described in Paragraphs 59-64 below.

DAMAGES

59. As a direct and proximate result of Defendants' conduct described herein, Plaintiff has suffered severe physical, mental and emotional trauma. This trauma has made Plaintiff incapable of obtaining or maintaining employment at his previous level, capacity and salary. Plaintiff has suffered significant diminished earning capacity for which he seeks compensation. Plaintiff will, in all medical probability, continue to be unable to obtain employment due to Defendants' actions. Plaintiff seeks to adjudge each of the Defendants' jointly and severally liable for the damages described below.

60. As a direct and proximate result of Defendants' conduct described herein, Plaintiff has suffered loss of past income in back pay for which he seeks compensation, which is no less than $88,450.00, plus retirement benefits, he would have accrued, plus normal raises he would have received, plus interest.

61. As a direct and proximate result of Defendants' conduct described herein, Plaintiff has suffered loss of future income or forward pay for which he seeks compensation. Defendants' conduct has created such antagonism between the parties so as to make it impossible for Plaintiff to regain his prior status and makes reinstatement unfeasible. Plaintiff seeks compensation for the present value of this income as follows:

(a) Future wages in the amount of not less than $530,700.00.

(b) Loss of future income attributable to normal raises for which he seeks compensation, which is no less than $40,000.00.

(c) Loss of retirement benefits for which he seeks compensation, which is no less than $50,000.00.

62. Plaintiff has further suffered injuries of mental anguish so severe as to cause physical manifestations and physical and psychological injuries. These have required medical treatment and have disabled and prevented Plaintiff from being able to get and keep employment at any level. Plaintiff has been forced to incur substantial medical bills, and incur other expenses as a direct and proximate consequence of Defendants' actions set forth herein, in an amount which is no less than $120,000.00.

63. Plaintiff seeks punitive damages against the Defendants, jointly and severally, for their willful and reckless conduct.

64. Plaintiff seeks attorney's fees reasonably incurred in the prosecution of this complaint.

WHEREFORE, Plaintiff requests that Defendants be cited to appear and answer herein, and that upon final trial, Plaintiff have damages as set forth above, reasonable attorney's fees, legal pre-judgment and post-judgment interest, all costs of court, and such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

WEST, ADAMS, WEBB & ALBRITTON, P.C.
by /s/ John C. Hampton
John C. Hampton
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Attorneys for Plaintiff

APPENDIX B

[Filed Mar. 29, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-90-638

JIM PARRACK, JR.,

Plaintiff,

vs.

TEXAS A&M UNIVERSITY, et al.,

Defendants.

ORDER

Pending before the Court is Defendants' motion to dismiss. After careful consideration, the Court finds that Defendants' motion should be granted in part and denied in part.

Background:

Beginning in May 1978, Plaintiff was an employee in the Oceanography Department at Texas A&M University. On February 9, 1988, Plaintiff was summoned to a meeting with Defendants Rowe and Friedman and a University Police Detective. At the meeting, Plaintiff received a letter stating that he was suspended from his job for twenty days pending the investigation of a criminal mischief charge. In addition, the police officer informed Plaintiff that he was under arrest for criminal mischief. Defendants allege that Plaintiff was arrested

for having damaged a co-worker's car. During his suspension, Plaintiff resigned from his job.

In his lawsuit, Plaintiff alleges that he was wrongfully terminated and that he has incurred monetary, physical, and emotional damage as a result of the termination. Plaintiff brings the following causes of action against Defendants: 1) violation of due process rights under the Fifth and Fourteenth Amendments to the Constitution; 2) violation of the Age Discrimination in Employment Act, 29 U.S.C. §621; 3) intentional infliction of emotional distress against Defendants Rowe and Friedman; 4) tortious interference with contractual relationships against Defendants Rowe and Friedman; 5) violation of §503 of the Rehabilitation Act of 1973; and, 6) violation of civil rights under 42 U.S.C. §1983. Defendants filed a motion to dismiss which this Court denied at a pretrial conference on March 19, 1990. Defendants have filed a second motion to dismiss to which Plaintiff has not responded.

I. Plaintiff's claims of denial of due process and equal protection and violation of 42 U.S.C. §1983.

Because Plaintiff has sued an agency of the State of Texas and two of the agency's officials, the Court finds that the Eleventh Amendment bars Plaintiff's recovery of monetary damages for alleged civil rights violations. The Eleventh Amendment bars suits brought directly against the state or an agency of the state. *Edelman v. Jordan,* 415 U.S. 651, 665-72, 94 S.Ct. 1347, 1355-1360, (1974).

Plaintiff attempts to argue that the Court may award damages against Texas A&M because monies to pay the damages would not necessarily come from State funds. Plaintiff contends that much of the University's money derives from private sources. However, the Fifth

Circuit has held that Texas A&M is an "alter ego of the State of Texas" and that "any suit against the University or its officials for monetary relief is a suit against the state and is therefore barred by the Eleventh Amendment." *Gay Student Services v. Texas A&M University,* 737 F.2d 1317, 1333-1334 (5th Cir. 1980).

Further, the Court finds that Plaintiff's §1983 claim should be dismissed because Plaintiff has failed to state a claim for violation of equal protection. Plaintiff has not alleged any prohibited basis for the alleged denial of due process and has failed to allege that there were others similarly situated who were treated differently from Plaintiff.

Regarding the claims against Drs. Freidman and Rowe in their individual capacities, the Court finds that the two are protected from suit in their individual capacities by the doctrine of qualified immunity. In his first amended complaint, Plaintiff asserts that Defendants acted with "callous disregard" for Plaintiff's rights under the United States Constitution. However, Plaintiff fails to allege that Defendants acted in a deliberate fashion to deprive Plaintiff of his Constitutional rights. As discussed by the Fifth Circuit in *Kline v. North Texas State University,* 782 F.2d 1229 (5th Cir. 1986), the standard for establishing the liability of state officials in their individual capacities is a difficult one which requires Plaintiff to show that Defendants took deliberate steps to violate his Constitutional rights. Because Plaintiff has failed to allege such facts, the Court finds that his claims of Constitutional violations against the Defendants, as individuals, should be dismissed.

II. Plaintiff's claim under the Age Discrimination in Employment Act.

Plaintiff correctly states that Defendants are not entitled to a grant of immunity with regard to Plaintiff's claim under 29 U.S.C. §621, the Age Discrimination in Employment Act ("ADEA"). The Court finds however that Plaintiff's claim under the ADEA may not be brought against Defendants Friedman and Rowe because these individuals were not, at any time, Plaintiff's employers for purposes of the Act.

III. Plaintiff's claims under the Rehabilitation Act of 1973.

Under the Rehabilitation Act of 1973, a plaintiff must allege 1) that he is a handicapped individual as set out in the statute; 2) that he is otherwise qualified to participate in the activity at issue; 3) that he was excluded solely by reason of his handicap; and 4) that the program received federal funds. In his original complaint, Plaintiff alleges that his subdural hematoma substantially limited his major life activities.

Plaintiff fails to allege what major activities, if any, were limited as a result of his handicap. Further, in his petition, Plaintiff states that he had recovered from the condition which allegedly caused his handicap by the time of his alleged wrongful termination. The Court finds that Plaintiff has failed to state a claim under the Rehabilitation Act and as such this claim is dismissed.

IV. Plaintiff's state law claims of intentional infliction of emotional distress and tortious interference with contractual rights.

Regarding Plaintiff's state law claims of intentional infliction of emotional distress and tortious interference

with contract rights against the individual Defendants, the Court finds that it lacks jurisdiction to hear these claims in light of the fact that there are no federal claims pending against the individual Defendants.

For the reasons stated above, it is hereby ORDERED that Defendants' motion to dismiss is GRANTED in part. The following claims are DISMISSED:

1. Plaintiff's claims against the University, the Defendants in their individual capacities and in their official capacities under §1983 and the Fifth and Fourteenth for violations of Plaintiff's Constitutional rights;

2. Plaintiff's claim under the Rehabilitation Act of 1973;

3. Plaintiff's claim against the individual Defendants under the Age Discrimination in Employment Act; and

4. Plaintiff's claims against the individual Defendants for tortious interference with contractual rights and intentional infliction of emotional distress.

Defendant's motion to dismiss is DENIED as to Plaintiff's claims against the University under the Age Discrimination in Employment Act.

Signed this 27th day of March, 1991 at Houston, Texas.

/s/ Norman W. Black

Norman W. Black

United States District Judge

APPENDIX C

[Filed June 11, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-90-638

JIM PARRACK,

Plaintiff,

vs.

TEXAS A&M UNIVERSITY, et al.,

Defendants.

FINAL JUDGMENT

The Court, having GRANTED Defendants' motion for summary judgment, hereby DISMISSES the above-styled action.

Signed this 7th day of June, 1991 at Houston, Texas.

/s/ Norman W. Black
Norman W. Black
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-1772

Summary Callendar

JIM PARRACK, JR.,
Plaintiff-Appellant,

v.

TEXAS A&M UNIVERSITY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(CA H 90 0638)

(February 13, 1992)

Before POLITZ, Chief Judge, KING, and E. GARZA, Circuit Judges.
PER CURIAM:*

Jim Parrack appeals from the district court's dismissal of his suit against Texas A & M University (TAMU) and two of its employees. The district court dismissed Parrack's complaint because it found that TAMU was entitled to Eleventh Amendment sovereign immunity, that

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

the individual defendants were entitled to qualified immunity, and that Parrack failed to state a claim under the Rehabilitation Act. We affirm the dismissal.

I. BACKGROUND

Parrack was employed by TAMU in its oceanography department from 1978 to 1988. Sometime around May 1987, Parrack began to suffer from a subdural hematoma which, he alleges, impaired his ability to perform his job and supervise his subordinates. In June 1987, following an accident, the hematoma was surgically removed. Although his complaint is somewhat unclear, it appears that Parrack began to re-assume his duties gradually following his surgery. By February 1988, Parrack had recovered completely.

During late February 1988, Parrack was asked to prepare a memorandum for his supervisor stating that Parrack would be returned to the full duties he performed prior to his accident and surgery. The day he presented his supervisor with the memorandum, however, Parrack was arrested by the TAMU police based on charges filed earlier that he had deliberately damaged another employee's car. At that time, he was suspended without pay. He alleges he was also told that he would be asked to resign irrespective of the outcome of the charges. Parrack alleges that he "was forced to resign his position at [TAMU]."

Parrack filed suit in February 1990, alleging that TAMU and two of its employees, acting in their official capacity, had denied him his right to due process and equal protection, had discriminated against him on the basis of age, and had discriminated against him on the basis of his handicap. Parrack also alleged state causes of

action, including intentional infliction of emotional distress and tortious interference with contract.

The defendants responded with a motion to dismiss the complaint, which was denied in order to give Parrack an opportunity to amend his complaint. Following Parrack's submission of an amended complaint (which added claims against the TAMU employees in their individual capacity), the defendants again moved for dismissal under Rules 12(b)(1) and 12(b)(6) on the basis of TAMU's Eleventh Amendment sovereign immunity and the qualified immunity of TAMU's employees, as well as Parrack's failure to state a claim under the Rehabilitation Act. This time, the court largely granted the motion, dismissing all claims except the age discrimination claim. The district court later granted Parrack's own motion to dismiss with prejudice his age discrimination claim.

II. STANDARD OF REVIEW

Since the district court granted the defendants' Rule 12(b)(1) dismissal for lack of subject matter jurisdiction on the basis of the complaint alone, we review the decision by the same procedural standard as we would review a Rule 12(b)(6) dismissal for failure to state a claim. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). In both circumstances, we must consider the allegations in the plaintiff's complaint as true. *Id.; Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir.), *cert. denied*, 111 S.Ct. 279 (1990). We review de novo the district court's determination that it lacked subject matter jurisdiction. *Williamson*, 645 F.2d at 412. In reviewing the dismissal for failure to state a claim, we apply the same test as the district court; "[i]t must appear to a certainty that the plaintiffs can prove no set

of facts in support of their claims that would entitle them to relief." *St. Paul Ins. Co. v. Afia Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir. 1991); *Fee*, 900 F.2d at 807.

III. ANALYSIS

A. Eleventh Amendment

The Eleventh Amendment to the U.S. Constitution bars "suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury . . . ." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The bar extends as well to suits against agencies or officers of the state whenever the state is the real, substantial party in interest. *Id.* at 663. We have previously held that TAMU is "al alter ego of the State of Texas, [and therefore] 'any suit against the University or its officials for monetary relief is a suit against the state and thereby barred by the Eleventh Amendment.' " *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1333-34 (5th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1985) (quoting *Zentgraf v. Texas A & M Univ.*, 492 F. Supp. 265, 271-72 (S.D. Tex. 1980)).[1]

All of Parrack's claims against TAMU and the TAMU employees in their official capacity – except those brought under the Rehabilitation Act – were dismissed for lack of jurisdiction under the Eleventh Amendment.[2]

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[1] Parrack urges us to reconsider the conclusion that TAMU is clothed in Eleventh Amendment immunity. He does not suggest that any relevant factual circumstances have changed or that the statutory relationship between TAMU and the state has been altered in any way. We consequently decline the opportunity to revisit this question.

[2] Although the Supreme Court in 1985 dismissed a Rehabilitation Act claim based on a defense of Eleventh Amendment

[footnote continued]

The district court reasoned that this case was controlled by *Gay Student Services*, and we agree. *See Gay Student Servs.*, 737 F.2d at 1333-34. Parrack's claims quite clearly constitute a "suit against the University or its officials for monetary relief"; as such it " is a suit against the state and is therefore barred by the Eleventh Amendment." *Id.* Beyond asking us to "reconsider" our controlling authority in this area, Parrack offers no arguments or precedent which would compel a contrary result.

Parrack argues on appeal that his complaint stated a claim upon which relief could be granted as to the constitutional and civil rights claims, and thus that they should not have been dismissed. The district court held that "the Eleventh Amendment bars Plaintiff's recovery of monetary damages for alleged civil rights violations"[3] Eleventh Amendment immunity constitutes a jurisdictional bar to suit. *See Jordan*, 415 U.S. at 677-78. Since the district court dismissed Parrack's constitutional and civil rights claims for lack of subject matter jurisdiction under Rule 12(b)(1), Parrack's arguments under Rule 12(b)(6) are inapposite.

B. Qualified Immunity

The district court dismissed Parrack's claims against the TAMU employees in their individual capacities on the basis of the defendants' qualified immunity. The

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sovereign immunity, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), Congress subsequently amended the Act to make explicit that the Eleventh Amendment would no longer constitute a defense to Rehabilitation Act claims. 42 U.S.C. §2000d-(7).

[3]The court further found, as an alternative basis for dismissal of the §1983 equal protection claims, that Parrack failed to state a claim for violation of equal protection.

court held that Parrack had failed to allege that the defendants acted in a deliberate fashion to deprive him of his constitutional rights. We understand this to mean that Parrack's complaint failed to "plead specific facts with sufficient particularity to meet all the elements necessary to lay a foundation for recovery, including those necessary to negative the defense of qualified immunity." *Brown v. Texas A & M Univ.*, 804 F.2d 327, 333 (5th Cir. 1986) (citing *Elliott v. Perez*, 751 F.2d 1472, 1479, 1482 (5th Cir. 1985)).

Government officials whose status entitles them to claim qualified immunity are entitled to more than notice pleading. *Elliott*, 751 F.2d at 1479. Although we have held that a plaintiff should be given an opportunity to provide detailed facts concerning the allegations and rebutting the qualified immunity defense, *id.*, in this case Parrack was aware of the defendants' potential qualified immunity defense, and included a prospective response to it in his amended complaint. He does not contend on appeal that he was denied the opportunity to present sufficient factual allegations to the district court.[4]

Parrack claims that his constructive discharge at the hands of the individual defendants denied his rights to equal protection and due process. Parrack does not

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[4] Following the dismissal, Parrack moved the district court for leave to file a second amended complaint, but the district court denied the motion. Parrack does not provide in his appellate brief any more detailed allegations which would be sufficient to overcome the defense of qualified immunity. The district court permitted Parrack to file one amended complaint when it denied the defendants' first motion to dismiss. Parrack does not allege, nor does the the record disclose, the existence of circumstances which would merit his being permitted to replead. *Cf. Brown*, 804 F.2d at 336-38.

allege that he is a member of a protected class, or that any similarly situated employees were treated differently. Consequently, his equal protection claim lacks support.

Parrack asserts that he was denied due process because he was given no opportunity to address the allegations of misconduct (presumably he refers to the charges filed with the university police). Parrack's brief on appeal asserts that his complaint alleged that the individual defendants "arrang[ed] the arrest and termination of Parrack's employment." However, the complaint itself never seeks to implicate the individual defendants in Parrack's arrest by the university police, except to assert that the individual defendants were present at the meeting where Parrack was placed under arrest by a university police detective.

The allegations complained in Parrack's amended complaint amount to a contention that the individual defendants first led him to believe that he would be returned to his earlier responsibilities, and later told him that he would be asked to resign. He also alleges that he "was prevented from offering any explanation or defense to the allegations against him and was forced to resign from his position . . . ."

This type of vague and uncertain statement does not amount to allegations of specific facts of sufficient particularity which we have required since *Elliott*. *See Brown*, 804 F.2d at 333. In order to allege a Due Process violation, Parrack would be required to demonstrate (1) that he had a property interest in his position with TAMU, (2) what process was due him, and (3) that the defendants' failure to provide that process amounted to a violation of clearly established law. *Id.* Although Parrack argues on appeal that Texas law provided him a property

interest in his position at TAMU, neither his complaint nor his brief on appeal alleges with any specificity the particular process he was due or that the defendants' failure to provide it violated clearly established law.[5] "Under the standards set forth above [Parrack's] complaint is completely deficient." *Id.*

C. Rehabilitation Act Claim

The district court based its Rule 12(b)(6) dismissal of Parrack's Rehabilitation Act claim on two findings. First, the district court found that Parrack had failed to allege what "major life activities" were impaired by his alleged disability. Parrack's complaint alleged that the hematoma caused him to become disorganized and dizzy, and to have headaches, loss of concentration and memory. It alleges that the condition affected all areas of his life, including his ability to perform his job and supervise his subordinates. We do not today reach the question whether these allegations, without more, would constitute a handicap within the statutory definition. *See* 29 U.S.C. §706(8)(A). We cannot say, however, that based on these allegations, Parrack could prove no set of facts which would entitle him to relief under the statute.

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[5] Parrack asserts that the constitution guarantees him "the fundamental opportunity . . . to hear and respond to the charges brought against him," but does not show how that abstract guarantee has been violated in this case. Such allegations of abstract rights are precisely the sort of vague notice pleading against which qualified immunity may be successfully invoked. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Parrack asserts that the individual defendants' conduct "violated clearly established statutory and constitutional right [sic], that reasonable people would know." Such a recitation of the legal standard, unconnected to any particular facts, cannot act as a bootstrap to satisfy the standard which it states.

See Fee, 900 F.2d at 807. Second, the district court noted that Parrack's complaint alleged that he had completely recovered from his disability by the time he was terminated. The district court's reasoning suggests that Parrack was no longer entitled to the benefit of the statute once he had recovered from his disability. The statute provides, however, that " 'individual with handicaps' means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. §706(8)(B). Parrack's complaint alleges that the effects of his disability – specifically, the strained relationships which resulted from his diminished ability to perform his job and supervise his subordinates – remained after he returned from surgery. Construing this allegation liberally, we cannot say that Parrack could prove no set of facts which would entitle him to relief.

Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a), prohibits discrimination against otherwise qualified handicapped individuals in programs and activities that receive federal financial assistance. *Chiari v. City of League City*, 920 F.2d 311, 315 (5th Cir. 1991). Parrack would be required to prove four elements in order to maintain a cause of action under §504: (1) that he is handicapped within the meaning of the act, 29 U.S.C. §706(8)(A); (2) that he is "otherwise qualified" for the position he claims he was denied; (3) that he worked for a program or activity which received federal financial assistance; and (4) that he was terminated solely because of his handicap. *Id.*; *see also Doe v. New York Univ.*, 666 F.2d 761, 774 (2d Cir. 1981).

Parrack's complaint at least suggests that he suffered from a handicap, although we do not pass on whether the condition he alleges in his complaint would actually qualify as a handicap under 29 U.S.C. §706(8)(A). The complaint asserts that TAMU is an institution that receives federal aid as defined in the statute. Parrack's complaint does not assert in as many words that he was otherwise qualified for the position from which he was terminated. More importantly, however, Parrack does not assert that he was terminated solely because of his handicap. Parrack's complaint asserts that he "was a qualified individual to perform [sic] his duties of employment, and was wrongfully excluded and terminated from his employment by the Defendants herein."

It is hornbook law that under Rule 12(b)(6), although "the court must presume all factual allegations of the complaint to be true [,] . . . legal conclusions, deductions or opinions couched as factual allegations are *not* given a presumption of truthfulness." 2A James Wm. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶12.07 [2.-05] (2d ed. 1991) (emphasis added); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 23-24 (1st Cir. 1990) (general allegations must be supported by specific facts; allegations may not be based on unsubstantiated inferences or conclusions); *Fee*, 900 F.2d at 807; *Angel v. City of Fairfield;* 793 F.2d 737, 739 (5th Cir. 1986). Here, Parrack had an obligation to allege, as an element of his complaint, that he was terminated solely by reason of his handicap. 29 U.S.C. §794(a); *Traynor v. Turnage*, 485 U.S. 535, 549-50 (1988); *Chiari*, 920 F.2d at 315. His allegation that he "was excluded and terminated *wrongfully*" amounts to no more than a legal conclusion, the truth of which we may not presume. Consequently, the district court correctly

dismissed Parrack's causes of action under the Rehabilitation Act for failure to state a claim upon which relief can be granted.[6]

IV. CONCLUSION

For the reasons set forth above, we AFFIRM the judgment of the district court.

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[6]Since no federal cause of action remained before it, the district court properly dismissed Parrack's state-law claims.

APPENDIX E

[Filed Mar 17, 1992]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2722

JIM PARRACK, JR.,

Plaintiff-Appellant,

versus

TEXAS A&M UNIVERSITY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(March 17, 1992)

Before POLITZ, Chief Judge, KING and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

Clerk's Note:
See FRAP and Local Rules 41 for Stay of the Mandate